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## **"ROUGH JUSTICE," "FAIRNESS," AND THE PROCESS OF ENVIRONMENTAL MEDIATION\***

**Diane R. Smith\*\***

Martin Luther King said: "We must all live together [as rational human beings], or perish together as fools."<sup>1</sup> Well, with respect to environmental disputes, we *are* learning to live together as rational human beings, and we are doing it primarily through mediation. We *are* finding ways to eliminate or minimize litigation costs in what are almost invariably multi-party disputes, whose costs have staggered involved parties for two decades. As a result of this rational behavior, we are also able to utilize our collective intelligence to minimize collective damages. The process of learning to live together as rational human beings necessarily involves reaching a consensus of how our disputes will be resolved, what a satisfactory settlement must look like, and how to assure that our agreements with respect to resolution are actually implemented.

From the parties' standpoint, rational behavior can be difficult to achieve; but, rational behavior is particularly essential in environmental disputes because of the pervasive presence of that all-powerful party or power -- the government. In most other types of disputes, the parties are familiar with and have a basic respect for the liability theories involved, such as fault or negligence. Even if they disagree with the result of the application of such theories or with the level of damages assessed, they understand the rationale behind the liability. No such familiar basis for liability exists in environmental disputes because of the strict liability and/or joint and several liability aspects of the vast majority of environmental statutes and the power of the government to take action

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<sup>1</sup> OXFORD DICTIONARY OF QUOTATIONS 397 (Angela Partington ed., 4th ed. 1996).

when the parties fail to take action. Someone once wisely pointed out, however, that the best way to escape from a problem is to solve it. Nothing is more true with respect to environmental disputes.

Environmental mediators are often much like Harry Truman, who said, "I never give them hell. I just tell the truth, and they think it is hell."<sup>2</sup> Often, the "hell" of environmental disputes involves the fact that, in the final analysis, the question is not "am I liable." Rather, the questions usually are: "how much am I liable for?"; "what are our collective damages?"; and, "how can we resolve this without the process of dispute resolution raising the cost of the problem itself, or even interfering with our ability to address the problem?"

#### I. THE NATURE OF ENVIRONMENTAL AND PUBLIC POLICY DISPUTES

Environmental disputes are often multiparty disputes and are almost invariably complex and expensive. They frequently involve controversies and concern about the effect of contaminants on populations of humans other than those engaged in the dispute and about the fate or well-being of resources, which significant segments of the population consider to be public assets. Parties to such disputes can, and often do, include the public at large, one or more layers of government, as well as nearby or adjoining property owners. The traditional "parties" do not have complete control of how the condition underlying the dispute will be addressed.

Environmental issues can impact health and safety and property values for a wide range of persons. Resolution of underlying issues often requires expenditures far beyond the experience or ability of many of the parties. At times, the issues at stake are so financially, politically, and publicly charged that they are difficult to resolve through any means other than a third party decision-maker (judge, jury, or arbitrator) or the use of force or power. The traditional source of a third party decision in environmental disputes is recourse to the courts; and, the most usual source of a decision based on force or power is a regulatory agency or court demand, requirement or order.

Recourse to courts or to agencies takes control out of the hands of the parties. Using a third party decision-maker leaves parties open to unpredictability and a decision that may result in unbearable harm to a party's interest or, at least, a far more devastating loss than a

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<sup>2</sup> *Id.* at 704.

compromise would have caused. Relying on the courts or agencies for resolution of environmental disputes involves tremendous risks for the parties and can destroy the possibility of cost-effective, cooperative relationships among those most seriously affected by the underlying dispute. Litigation, or "proving up" on one's adversary, is not well-advised in the "joint and several" arena of environmental law. The interests of the parties are better served by reaching a consensus rather than reaching for a decision-maker.

Because of the inevitable power player, the government, and an often large and diverse group of parties or peripheral players, there is no one simple solution. There are, however, many ways in which mediators and mediation can assist the parties in dramatically reducing collective suffering. Use of any of the techniques available, however, requires, given the uncertainties inherent in most environmental fact patterns, that the parties believe that they will be treated fairly in the *process* of resolution, and that they have a sense that justice, or at least a rough justice, will be the *measure of a successful compromise* among the parties.

#### A. *Approaches to Environmental Dispute Resolution*

Techniques that can be called upon to ease the pain of environmental disputes include:

- Getting the disputes out of the courts, or at least on "hold" while negotiations continue.
- Minimizing both individual and collective costs through cost sharing.
- Joint advocacy of and implementation of reasonable cleanup standards to reduce overall costs.
- Use of fair allocation frameworks that do not result in disparate treatment of, or unfair effects on, some parties to the detriment of some and the benefit of others.
- Adjustment systems using alternative dispute resolution procedures (mediation, appeal rights, arbitration) to revise initial assessments of liability when new information is obtained.
- Reduction of legal fees and other related "transaction" costs associated with litigation.

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- Joint addressing of peripheral problems, such as issues with lenders and tenants, so as to take care of some problems that can be addressed without expenditures.
- Joint funding of technical support for research and preparation of documentation to alleviate health risk concerns.
- Avoiding intra-group battles of the experts.
- Taking pains not to increase regulators' or the public's concern about the site(s) in question.
- Maintaining realistic expectations (i.e., eliminating expectations of gold-plated cleanups) or windfalls in terms of damage recoveries.
- Sharing of experts and divisions of work among experts.
- Dealing with fear through effective media relations, public communication, employee education, and skilled and trustworthy consultants.

*B. Developing the Necessary Level of Confidence in the Process*

Use of the above techniques depends, at least, on developing a modicum of trust among the parties in terms of the process of the approach used for resolution. Trust can be developed by working together to determine a scheme for resolution that fosters belief in the overall fairness of the approach to be used. Parties' perceptions of fairness depend, in large part, upon acceptance of the process that is established for resolution of the dispute. A process that engenders a sense of fairness requires that the parties commit to certain ground rules for arriving at goals and priorities, including:

- Commitments to make all disclosures necessary for the group to arrive at informed decisions about shares of responsibilities.
- Equal access among the parties to information to assure that necessary, essential disclosures have been made and all information has been considered.
- Group confidentiality to assure that disclosures are not used by third parties against the group or individuals.

- Principled allocation frameworks based on all available information.
- Clear understandings of future responsibilities.
- A system for follow-up and sanctions for non-performance.

In order to commit to and implement ground rules, it is necessary for the parties to have a method of reaching a consensus. Reaching a consensus allows multiple parties to: (1) deal collectively with the inevitable pervasive involvement and power of one or more layers of government as a party and/or a decision-maker; (2) adjust as a group to changes in the make up of the group itself; and, (3) reach solutions that the group can live with in the future. Consensus and concerted action is particularly important in environmental disputes because public perception and controversy could have a significant effect on what must be done, such as when an environmental cleanup is necessary. Divisiveness among group members can greatly increase the groups' overall cost and exposure. Consensus through mediation minimizes costs by presenting a coordinated front and maximizing collective efforts with respect to agencies and issues.

### *C. Consensus Building Means Going Slow to Go Fast*

As Gandhi once pointed out, "There is more to life than increasing its speed."<sup>3</sup> Consensus building takes time, but it avoids the nearly inevitable upward spiral of unresolved conflict and the waste and destruction of prolonged antagonism. Environmental disputes, not resolved through a process of reaching consensus, become sharper, more expensive, and more difficult to resolve. Such disputes squander resources, cause distraction, and result in the loss of opportunities.

Without facilitation by a third party, reaching a consensus and achieving resolution of a dispute is frustrating and often impossible. The issues are far too complex, the numbers of parties too high, and differences among parties too extreme. Further, the disputes are made more severe due to the tactical difficulty and frequent counter-productivity of dealing piecemeal with the involved governmental entities.

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<sup>3</sup> LOUIS E. BOONE, QUOTABLE BUSINESS 302 (1992).

### 1. Building Consensus: Principles

Consensus building is facilitated by attention to certain principles that create a sense of fair play. At the very outset of the mediation process, mediators should focus on establishing the following:

- A belief that reaching a consensus is the optimum way of addressing the concerns underlying the dispute.
- An understanding that the consensus building process must be inclusive, not exclusive. The involvement of all parties should be sought, including not only those *affected* by the process or outcome and those necessary to achieve a resolution, but also those who could undermine or sabotage the process with a significant interest. All such parties' participation should be solicited, though not all need be present at every meeting or at every stage.
- An appreciation that a voluntary process creates incentives for the parties to cooperate and be reasonable. The risk of alienating a party to such an extent that they withdraw from the process, splinter attention and delay or frustrate concerted effort is an incentive to rational action and conduct. A conscious decision to include all interests, because that is the way to maximize the effectiveness of resolution, directs the parties' attention to contributing their best efforts to achieving a resolution.
- A recognition that there is no one answer to any given problem, and that solutions must be designed to meet the group's specific circumstances and needs.
- An appreciation that flexibility is essential. It is not possible to anticipate everything that might eventually happen at the outset of a problem solving process. The process of reaching a resolution and implementing the solution must remain available, open, fair, and equitable. For some parties, this means that the process will not proceed as quickly as they had hoped. Patience is essential, and the mediator must take the lead in exhibiting patience.
- A commitment to providing all necessary information to all involved parties. Parties vary in their levels of sophistication and in their ability to mobilize resources. If all necessary parties

are to be part of a settlement, weaker parties must have adequate access to whatever necessary information is available to the more powerful members of the group.

- An appreciation of the inevitability and legitimacy of diverse values and interests.
- Confidence in the fact that trust and openness will move participants beyond bargaining over positions to exploring underlying interests, needs, and, eventually, options. Building trust is largely dependent on confidence in the integrity and competence of those who convene the mediation, particularly the mediator. The mediator must assist participants in dealing with setbacks, analyzing information, protecting important interests, using clear and accurate statements, affirming group successes, and avoiding or controlling rhetoric. The mediator must also assure that the parties dedicate sufficient time for the process to work.
- Acceptance of the fact that accountability and follow-up must be built into any solution. Accountability builds understanding and commitment, minimizes surprises, and fosters trust. Participants must be accountable not only to their constituents, but also to the consensus building process. Group representatives must provide timely feedback and reporting not only to their own constituents, but also to the group of participants as a whole.
- Time limits. Clear, realistic deadlines marshal resources, focus efforts and mark progress.
- A plan that must include implementation, support, and follow up. Implementation usually requires both government acceptance and a way to deal with post agreement problems. Implementation also requires identification of who is responsible for what and when, a realistic timetable and funding for agreements reached, and development of procedures for review, revision and renegotiation.



## 2. The Process of Consensus Building in Mediation

From a very practical standpoint, making consensus building work in mediation requires:

- That the parties develop a carefully articulated statement of what worthwhile problem must be jointly solved. At a minimum, the statement should include the concept of minimizing collective costs and maximizing efficiency in dealing with any involved governmental agencies.
- Motivation. Motivation arises most frequently as a result of a crisis. Therefore, the high cost of the problem in terms of time and money, potential unsatisfactory outcomes, and the availability (or unavailability) of options must be emphasized. In environmental disputes, the fact that the government will take action, if the parties do not, is usually a strong motivator.
- The ability to identify and document issues. A clear visible agenda should be displayed at meetings and should be discussed in a collaborative way, in advance, with key participants. Are the items appropriate? Is enough time allocated for each? Have any issues been forgotten? Are they in the right sequence? How much time for each item? The agenda should be reviewed at the conclusion of the meeting, items added, and items listed for revisitation when the group next meets. Prior to the next meeting, the mediator should circulate the agenda and request feedback.
- That group discussions be kept focused, relevant, and appropriately sequenced. Tactfully squelching digression into war stories and injustice is helpful.
- Use of effective communication techniques such as effective listening, reflecting, periodic summarization, encouragement of participation, and maintaining a positive tone.
- Good record keeping. Recording major ideas and viewpoints and creating a group memory to use for guidance, to refresh recollections, and to test agreements is invaluable and essential to the avoidance of a perception of chaos.
- Using time between meetings. This includes correcting misperceptions, communicating new information, testing new

ideas, arranging for technical assistance, and planning the next meeting.

- Involving constituents of representatives. Representatives must keep their constituents informed; representatives of constituent groups must be asked at every critical point, "Will your group support that position?"
- The ability to handle intense emotions in public. This may require: contacting parties before a meeting to tell them what to expect, listening to what someone needs to say in advance of the meeting and suggesting different approaches, setting boundaries by setting agendas; emphasizing that the meeting's success is dependent on the parties' conduct, acknowledging feelings; avoiding sensitive words; being willing to terminate the meeting if necessary, and interrupting personal attacks.
- Overcoming resistance to negotiations. Resistance stems from a wide range of concerns: fear of exhibiting weakness, distrust so severe that good faith agreements seem impossible, an attitude that a party can win without negotiating, unfamiliarity with, and the perceived risk of, the mediation process itself, availability of other options, and fear of increasing the visibility of the dispute. Resistance can be overcome by utilizing the strength of public opinion within and outside of the group, explaining the advantages of negotiation, making the inevitable costs and disadvantages of other courses of action obvious, stressing the unpredictability of adversarial processes, and insisting on "trying one more meeting."
- Keeping people at the table. Parties must be prepared for some degree of frustration. Gains must be made explicit; the group must be used for support and to keep negotiations alive; parties must be aware of hidden obstacles; and the mediator must enforce group mandated ground rules, let troublesome people go, ask for replacements when necessary, and insist on "trying one more meeting."
- Breaking deadlocks. This can be accomplished through: bringing in an outside expert, treating obstacles as routine problems thereby normalizing them, showing that there is a "new ball game" where skepticism exists regarding prior settlement efforts, reviewing past procedures and getting out of

old roles and habits, getting the right people at the table, breaking the problem into small pieces, brainstorming new options, developing alternative proposals, asking parties to be more specific, and insisting on "trying one more meeting."

- That the parties use their time well. The mediator must have a clear mandate from the group, prepare for meetings thoroughly and establish a problem solving setting. "Using time well" means that meetings should be conducted in a format that facilitates collaborative action rather than free-flowing discussion. Such use can include some meetings with all participants or the meeting of subgroups, such as task forces or committees. Whatever group structure is used, the members should establish ground rules as well as protocols for attendance at the group meetings, agreements as to confidentiality, and a schedule of milestones or interim dates for progress or action.

### 3. Criteria for fair allocation systems

One particular technique, use of fair allocation systems, deserves special, detailed attention. Criteria for successful allocations include considerations of the following:

- Advance consensus regarding what data is to be gathered and the methods of collection for and purpose of that data. Cooperating group members who are contributing funds for information collection will likely not appreciate being the focus of group-sponsored efforts to "prove up" additional damages on funding parties.
- Acceptable procedures regarding what the group will do about the inevitable "gaps" in available data, such as missing years of records and uncertainties as to quantities of waste or material. For example, where there are years of evidence of facility use for disposal by a particular party, then a gap in records, then years more of facility use by the same party, does the group assume that the party utilized the disposal facility during the years when records are missing? At what level of use? How can the assumption be overcome?
- Agreement on initial allocations to fund immediately necessary tasks, with agreement as to future reallocation and challenge procedures. Frequently, governmental demands will have

deadlines for action which cannot await the group's arrival at "final" allocations. Use of interim allocations to fund such actions as "removals" can avoid civil penalties or exacerbation of contamination, while still allowing adjustments to individual allocations in the future, according to a process the group decides upon.

- The need for internal consistency, freedom from obvious errors, use of all key information, soundness of working assumptions, reasonable fairness and recognition of reality, such as the possibility of unrecoverable shares. Funding of "orphan" shares or the shares of "empty chairs" may require more in the way of individual contributions than parties' true equitable share based on some standard such as volume. Reaching funds to reimburse the group for covering those shares is best served by concerted action of the group.

#### 4. Practical Allocation Approaches

Approaches which have been successfully used in environmental cases to set both initial and final allocations among numerous parties include combinations of the following:

- Time on the subject of owning property or business.
- Time operating the subject property or specific equipment.
- Time engaged in certain activities on the property.
- Level of business conducted with the pollution causing business.
- Known spills or used quantities.
- Known careless practices, or evidence of care.
- Known polluting incidents.
- Known chemical use or specific activities carried out on site.
- Former site configurations, process diagrams, aerial photos.
- Relative volumes of materials used.
- Relative volumes of materials sent to the site.

- Relative toxicity of each party's materials.
- Ability to prove that some damages are "severable," or distinguishable from the rest (i.e., liquids versus asbestos waste).
- The degree of cooperation of a party with regulators and the rest of the group ("Premiums" demanded from late joiners?).
- Contractual arrangements or circumstances which require bringing in other parties to assume liability for some parties (indemnities, assumptions of risk, statutory responsibility, successors).
- Consideration of land use restrictions on the part of present owners as a concession to the group's cost control efforts.
- Access to underground storage tank cleanup funds and insurance proceeds.
- Assumptions of continuous use where a pattern of use has been established.
- Assumptions regarding the volume of material remaining in "empty" containers.
- Assumptions regarding the nature of materials disposed of, spilled, or sent to a facility when records are missing.
- Contributions by group members, such as where a municipality allows disposal of site waste at a municipally owned disposal facility at reduced tipping fees, as part of its "share", or where a group member contributes certain types of work in exchange for a reduction in share.
- Agreement that the remediated facility will be sold and the proceeds distributed among members according to some agreement.

## 5. Allocation Procedures

To arrive at an allocation approach, it is often useful to follow a procedure to elicit potential approaches. Such a procedure can include facets such as:

- Each party preparing an "anonymous" list of factors considered crucial to any consideration of allocation.
- A subgroup, or the neutral, assembles a proposed approach, which is then configured by the group.
- A system of interim allocations, with a challenge process and alternative dispute resolution procedure set by a subgroup or neutral.

## 6. Structuring "Enforcement" Mechanisms

If parties are concerned about compliance with any agreement reached, they will not seriously negotiate. Enforcement after mediation is an important topic.

Enforcement often must be structured to include incentives for compliance. Assessing penalties from group members in the event of non-compliance, tied to a rebate in the absence of instances of non-compliance, helps keep risk down and incentives in place.

"Fallbacks" or contingency plans in the event of the occurrence of contingencies are wise. Such contingency plans can include financial assurance mechanisms, such as insurance or escrowed funds. Grievance and arbitration procedures, as well as penalty clauses and court consent to settlements, can also provide safeguards.

## 7. Tools

Tools utilized by mediators and parties in successful mediations incorporating those techniques have included:

- Cooperation and/or cost sharing agreements among parties.
- Indemnities and releases.
- Agreements regarding necessary actions in the future together with enforcement.

- Tolling agreements, dismissals without prejudice.
- Non-interference and confidentiality agreements.
- "Horse trading" among parties.
- Combining resources, sharing experts and costs.
- Use of land use restrictions or covenants.
- Assuring evaluation of all potential options.
- Enlisting the aid of regulatory or other governmental agencies and knowledgeable persons.
- Understanding of and experience in implementation of innovative government programs, such as pre-purchase agreements and voluntary cleanup agreements.
- Use of new insurance products to cover contingencies and future risk.
- Innovative approaches to reaching agency closure without delay.

*D. Answers to the Question "Why Should I Participate in Consensus Building Through Mediation?"*

When considering starting or participating in consensus building, or when attempting to convince parties to participate, the following questions are often useful:

- What reasons are there for a party to participate? Are there any real reasons not to get involved? Often, parties cite warnings from counsel about "free discovery" to be had by other parties in the course of mediation as a reason not to participate. Mediation does necessitate sharing of factual information. However, facts are always discoverable anyway, and the issue with respect to disclosure of involvement or on site conditions or prior use is generally how the information will be supplied and at what cost, not whether it will be supplied at all. Further, the exchange of information "cuts both ways;" that is, all parties' counsel have the same opportunities for "free discovery," all parties will eventually have access to the same information, and all avoid the expense of discovery to get it.

- What are the likely consequences of failing to reach a resolution voluntarily?
- What are the agencies likely to do, failing action from the parties? Where environmental agencies are involved, the consequences of inaction are extreme -- fines and potential treble damages for inaction, in some cases, plus the possibility of exacerbation of conditions leading to additional costs or liability if there is delay in reaching a resolution.
- Can the subject of the dispute be addressed now? Often, there is no way to *avoid* addressing the subject, since regulatory agency demands cannot simply be ignored, without the possibility of substantial additional damages or significant fines. If the subject of the dispute must be addressed, why not choose the context most likely to contribute to consensus?
- Can progress be made? Because of the pervasive power of governmental and regulatory agencies, *progress must be made*. The question is how, and at what "transaction" cost.
- Can major interests be identified? Often, the parties' major interest is identical in light of the joint and several aspects of environmental liability: minimizing aggregate, as well as individual, cost.
- Are there representatives who can speak for the various interests? Usually, concerted effort by a number of parties will provide an incentive for others to designate representatives to join the efforts to reach a consensus.
- Are there special incentives for reaching agreements? Special incentives are often provided by the potential actions of regulatory agencies in the face of inaction by the parties, if not by the parties' fundamental understanding of the situation generally.
- Can meaningful deadlines be established? Again, this issue can, and will, be addressed by regulators, failing action by the parties.
- Are governmental decision-makers willing to be involved? It is much more likely that governmental decision-makers will



demonstrate interest in flexibility and a cooperative attitude if parties have demonstrated their willingness to work together.

- Can a viable process for reaching consensus be structured? If it cannot be, then decisions as to future actions will be made by others outside the parties' control, resulting in something like an environmental dispute version of cutting off one's nose to spite one's face.
- Are there preliminary matters that need to be dealt with first? Should existing lawsuits be put on hold pending outcome of negotiations? Have some parties already expended significant funds, and must those expenditures be addressed first?
- Are there parallel activities that must be considered? Should the group fund a health based risk assessment early on in the process to facilitate a risk based solution? Should a public participation system be immediately implemented?
- Is another decision-making process more applicable or desirable? If so, why? What interests will be served by utilizing an adversarial process? There are few reasons for engaging in litigation because, according to credible reports, ninety-six percent of all cases settle anyway. The real questions are when will the case settle and what level of cost will be incurred or can be avoided in the process.

#### *E. Overcoming Resistance to Consensus-Building Mediation*

Because consensus building through mediation offers so many advantages, one of the questions mediators must ask themselves is why is it not more frequently used to resolve environmental disputes? The answer lies not in the unfamiliarity of counsel and parties with mediation; but rather, with perceptions of an advantage to litigation which is not perceived to exist in mediation. That advantage is the theoretical availability, in litigation, of a "just" decision based on the application of a rule of law. This theoretical (and illusory) advantage often stands in the way of settlement, even when mediation is convened. Parties sometimes believe that, if they go to court, they will win (or at least dramatically reduce their damages) because they have "the law on their side" or a very compelling factual case. In fact, though, consensus building through mediation offers not only the same opportunity, but also a more likely format to achieve a "just result," albeit in a slightly

different and, it could be argued, more powerful format. Further, technical arguments, which are often very difficult to effectively make in a litigation context, can be effectively put forth in a mediation context. In mediation, decision-makers (the parties themselves) have an opportunity to directly question "experts," and the mediator has the option of arranging for mutually acceptable shared experts to provide a technical basis for decisions without the implication of partisan opinions from experts for any one party.

The view that litigation is the gateway to a just result is a myth. As every experienced litigator will attest, courts/juries do not inevitably respond predictably and well to artful legal arguments. Court decisions do not uniformly conform to established legal principles. Litigation by no means guarantees a "just" result, or even one based strictly or even substantially, on legal precedent or the facts. Regardless of how good one's case appears to be, there is no such thing as predictability in litigation. In addition to the possibility of losing completely and sustaining catastrophic damages, parties may end up with a split decision that puts them, after considerable expense and delay, in the same or even a worse position than they would have been in if they had settled.

The possibility of an unfavorable result in litigation is exacerbated by the fact that advocates and parties suffer from two handicaps regarding the case in which they are involved. The first of these is "advocate and party optimism," which results from the natural tendency of parties and their counsel to believe their case is better than it really is. The second is "devaluation of offers," which results from parties' and their counsel's devaluation of settlement proposals because they come from the "other side."

Mediators must deal with the illusion of assured success as part of the effort of moving toward settlement, as well as with the parties' respective convictions and illusions regarding the strength of their cases and the value of opposition-sponsored proposals. Neither issue can be approached "head on," but rather must be dealt with in the course of the mediation process itself. The mediation format, which allows private caucuses with parties and counsel, furthers this end in ways that litigation simply cannot equal.

With respect to the expectation of a "just" result based on the rule of law strictly applied, mediators are able, privately, to make the point that parties are much more likely to be able to count on a "just" (or at least a

"roughly just") result in mediation. Mediators credibly take issue with uncalled for optimism while maintaining neutrality by using questioning techniques and observations to poke holes in both/every side of the case, without making the parties or their counsel look bad or unreasonable. Usually, focusing on the precise elements of each cause of action and on the available evidence is enough to at least shake the confidence of realistic or experienced litigators. A credible mediator forces the parties to reevaluate their positions, without appearing to be forcing anything at all.

The format of mediation allows each party (and the mediator) to expose the other party or parties, as well as counsel, to another view of the evidence and another potential interpretation and application of the law. No matter how secure an advocate may be in his or her position prior to mediation, other parties' views, their counsels' views, and the mediator's views do matter and do make an impact. Listening to the other "spins" on the case and the mediator's assessment and commentary make a difference and, often, allow or persuade parties and counsel to view the matter through "different eyes."

Because of the enhanced ability of counsel to make legal arguments and elaborate at length and repeatedly on facts in mediation, counsel is at least as important in mediation as in litigation. Counsel is able to argue law and fact in a very focused but flexible context; counsel has every opportunity for an informed discussion or review of various aspects of the case, both in front of the parties and other counsel and with the mediator privately. At least in this mediator's experience, counsel's arguments have a great deal of force in mediation, and a significant effect on the outcome, in terms of basing outcome on applicable law. This is because the parties and their counsel are very attentive, more so than a jury might be, to the strength of the other party's legal arguments. In addition, the mediator is able to translate the parties' arguments into a format that may be more persuasive and effective than if the same argument came solely from the opposition.

An additional advantage for counsel is that, in mediation, counsel is able, through the mediator, to make client(s) aware of weaknesses in their case without counsel seeming to exhibit weakness or to lose faith in their own arguments. In the event that mediation is unsuccessful, the process itself usually convinces client(s) of the necessity of litigating cases that do not settle. It becomes obvious, after a sincere effort to settle through mediation with parties present, that every settlement effort has been made, and there is no option other than a third party decision-

maker. The certainty that litigation is necessary creates a better client relationship and a greater understanding by a party who may well be adversely affected by an adverse outcome in court.

#### F. SUMMARY AND CONCLUSIONS

We truly must all learn to live together as rational human beings, or die together as fools. Mediating environmental disputes is evidence of, and a way to benefit from, rational behavior. Environmental and public policy disputes are frequently multi-party, fact and expert intensive and often "high stakes" experiences. Both parties and their counsel will be well served by use of the mediation process, which provides a much more favorable "stage" for legal and equitable arguments than litigation and a much safer approach to resolution than can ever be achieved in court. There is little doubt that mediation use will continue to be an optimum approach for many cases which are otherwise not resolvable without tremendous investments of money and time.

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